



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 324 OF 2008

JULIUS MUSILI KYUNGA..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES...2ND DEFENDANT

JAMES MURIUKI KARAYA.....INTERESTED PARTY

RULING

1. By Notice of Motion Application dated 20th June 2017 expressed to be brought under Section 80 of the Land Registration Act, No. 3 of 2012 and Section 3A and 3B of Civil Procedure Act the Plaintiff/Applicant seeks for orders:

1. Spent

2. That the court be pleased to order the rectification of Register of title to PLOT SUB-DIVISION NUMBER 3812/I/MN and remove entry No.8 thereof.

3. That the Registrar, Mombasa be directed to implement the order forthwith.

4. That the costs of this application be provided for.

2. The Application is supported by the affidavit of Julius Musili Kyunga sworn on 20th June, 2017 and premised on the following grounds:

a) The applicant is the registered proprietor of PLOT SUB-DIVISION NO.2812/I/MN (the suit property).

b) The court issued an order on 30/10/15 which had nothing to do with the suit property.

c) The Registrar registered the order of the court 30/10/15 by mistake as it serves no purpose

d) The entry by the Registrar has created an encumbrance against the title to the suit property.

e) The registrar has refused, short of a formal court order to rectify the title hence this application.

f) The application is urgent since the applicant desires to use the title as a proprietor.

3. In his submissions dated 12th February, 2018, the plaintiff submitted that on 30/10/15, the court issued an order which partly read:

“That prayer 6 seeking conservatory orders for status quo to ensure that pending hearing and determination of this suit;

a) The 1st Defendant and the Interested Party are restrained from registering a transfer over PLOT LR. NO.2812/I/MN.... ”

4. That on 22/6/16, the Registrar mistakenly registered a prohibition against the title purportedly arising out of the said court order. It is the Plaintiff's submission that the said Registrar might have misunderstood that order and further that the said order did not have to be registered against the title. The plaintiff submits that the said order was in personam and not in rem against the suit property. That the order was directed specifically towards the 1st Defendant and the Interested Party and not against the suit property generally. It is the Plaintiff's submission that by registering the said prohibition against the title, the registrar misapprehended the court's order, the effect of which is that innocent third parties are being affected. In the circumstances, the plaintiff urged the court to grant the order to have the entries removed. The plaintiff relies on the case of *Mary Ruguru Njoroge-v- John Samuel Gachuma Mbugua & 4 Others (2014) eKLR* in which the court set out the law on rectification of a title under Section 80 of the Land Registration Act, and the case of **Republic –v- Attorney General & 2 Others Ex Parte APM Termanal B.V. (2015)eKLR** where Odunga, J distinguished between orders in rem and orders in personam.

5. The 1st and 2nd Defendants supported the Application. However, the Application was opposed by the Interested Party through the Replying Affidavit sworn by James Muriuki Karaya, the Interested Party on 2nd August, 2017. He depones that on 11th November, 2008, he entered an Agreement of sale with the 2nd Defendant to purchase the land known as **PLOT NO. 2812/I/MN** Shanzu at a public Auction. That before proceeding with the registration of the suit land in his favour, on 4th November, 2008 the Applicant moved and obtained orders of injunction restraining the same. That on 16th March, 2015, the Applicant moved the court for injunctive orders which were issued on 30th October, 2015. The Interested Party states that upon perusal of a copy of the title annexed to the supporting Affidavit on record, he has noticed that the Applicant has since caused to be registered on the title a discharge of charge, the subject of the sale by public auction. Relying on legal advice, the Interested Party argues that pursuant to the existing laws and procedure, the 1st defendant lawfully exercised its power of sale as chargee by selling the suit property on 11th November, 2008 by public auction and passed a valid title to the Interested Party; that as at 30th August, 2016 when the Applicant caused to be registered a Discharge of Charge, against the title, the property had already been sold on 11th November 2008, thus extinguishing the Applicant's equity of redemption (if any) at the fall of the hammer; that the Court of Appeal in Civil Appeal No.3 of 2013 filed by the Applicant found that the Applicant lost his right of redemption by virtue of the Auction Sale; and it is therefore not correct for the Applicant to allege ownership of the suit land and that the applicant's remedy lies in an action for damages upon the lapse of their equity of redemption. The Interested Party avers that he lodged a caveat against the suit parcel and argues that the applicant ought to have moved court for orders of review of the order now impugned.

6. In his submissions dated 3rd April, 2018, the Interested Party submitted that the registration of a discharge of charge on the suit parcel after the hammer had fallen at a public auction is alien in conveyancing or law of contract and relied on the case of **Bomet Beer Distributors Ltd & Another –v-Kenya Commercial Bank Ltd and 4 Others (2005)eKLR**, **Nationwide Finance Company Limited –v-Meck Industries Ltd (2005)eKLR** and **Mary Njeri Ngowi –v- Housing Finance Company of Kenya Limited & 2 Others HCCC NO.1864 of 2000** and Section 69B of the Transfer of Property Act (repealed). Reliance was also made on the case of **Kitur & Another –v-Standard Chartered Bank & Another (No.2) (2002)I KLR 640** and Section 99 of the Land Act, 2012 as well as the case of **Johnstone Amulioto Ayub –v- Peter Mwangi Njuguna (2013)eKLR**.

7. I have considered the application. In my view, the only issue for determination is whether this court can grant the orders sought. Having considered the material placed before this court for consideration, it is not in dispute that the dispute is over the suit property particularly as between the Interested Party on the one side and the Plaintiff and the Defendants on the other side. The Interested Party insists that the Plaintiff lost his right of redemption by virtue of the auction sale in which the Interested Party was the successful party. The Court of Appeal said as much in Civil Appeal No. 3 of 2013 being an appeal from the ruling of this court (Ojwang, J as he then was) in this matter. Further, the order of Omollo, J made on 30th October 2015 was clear that the conservatory order for status quo issued was to ensure that the suit property was not transferred. Whereas the Plaintiff has purportedly withdrawn his suit against the Interested Party, the Interested Party's counter-claim is not doubt still pending. The Application dated 20th June 2017 is not seeking review of the court orders of 30th October and this court cannot pretend to be sitting on appeal over the orders made by Omollo. J. In my view, for as long as the suit or any part of it is pending, the said orders of 30th October, 2015 will remain in force, unless set aside by consent of all the parties or through review or appeal, which is not the case in the present application.

8. For the reasons above, I find that the Application dated 20th June, 2017 has no merit and the same is dismissed with costs to the Interested Party.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Wafula holding brief for Munyithya for Plaintiff

Gathu holding brief for Waweru for Defendants

Maundu for Interested Parties

Yumna Court Assistant

C.K. YANO

JUDGE